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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/739,085	12/19/2003	Hiroshi Hagino	246754US	9926

22850 7590 10/10/2007

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EXAMINER
VAKILI, ZOHREH

ART UNIT	PAPER NUMBER
1614	

NOTIFICATION DATE	DELIVERY MODE
10/10/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/739,085	HAGINO ET AL.	
	Examiner	Art Unit	
	Zohreh Vakili	1614	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *02 March 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *8-24* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *8-24* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claims 8-24 are presented for examination.

A request for continued examination under 37 C.F.R. 1.114, including the fee set forth in 37 C.F.R. 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 C.F.R. 1.114, and the fee set forth in 37 C.F.R. 1.17(e) has been timely paid, the finality of the previous Office Action has been withdrawn pursuant to 37 C.F.R. 1.114. Applicant's submission filed March 2, 2007 has been received and entered into the present application. Claims 8-24 are pending and are herein examined on the merits.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation

under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 8-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Albitskaya, O.N. et al. of RU 2044770 of September 27, 1995, in view of Briand (US Patent No. 5508033) and further in view of Zulli et al. (US Pub No. 2002/0160064 A1).

Albitskaya et al. teach of cosmetic compositions of the seaweed of Chlorella, (see abstract). In addition, Albitskaya et al. even teach that the Chlorella is subjected to hydrolysis via proteolytic enzymes in order to obtain the protein hydrolysate. anticipated by Albitskaya, O. N. et al. of RU 2,044,770 of September 27, 1995. This claim is defined as a product-by-process claim and is a product, not a process, see In re Bridqeford, 357 F2d 679, 149, USPQ 5 (CCPA 1966). It is the patentability of the product claimed and not of the recited process steps which must be established, see In re Brown, 459 F2d 531,173 USPQ 685 (CCPA 1972); In re Wertheim, 541 F2d, 191 USPQ (CCPA 1976). A comparison of the recited process with the prior art processes does not serve to resolve the issue concerning the patentability of the product, see In re Fessman, 489 F2d 742, 180 USPQ 324 (CCPA 1974).

Briand teaches the utilization of algae extracts obtained by extraction in liquid phase, for the preparation of pharmaceutical, cosmetics, and food compositions with an anti-radical activity. The algae used are brown, green or red macroscopic algae, (see

abstract). Briand further teaches the algae extract obtained by aqueous extraction (see claim 10).

Zulli et al. teach that algal extracts have become continually more important as alternative raw materials in cosmetics. In particular, the blue-green microalga of the genus Spirulina is known for its high content of polyunsaturated fatty acids, essential amino acids, minerals and natural antioxidants, such as alpha-tocopherol and beta-carotene. Algal extracts are used as radical inhibitors in anti-aging cosmetics. The effectiveness of algal extracts in the treatment of cellulitis is due to its lipolytic activity and to an improved transportation of waste products (see col. 2, paragraph 0021). In addition, Zulli et al. teach that the cosmetics further comprise at least one algal extract, particularly an extract of algae of the genus Spirulina (see col. 2, paragraph 0017). Aqueous algal extract from genus Spirulina is present in the amount of 3.0% to 40% of the composition (see col. 4, Example 3).

The examples do not specifically reference a fermentation step, the silence of the disclosure regarding such a step is not is not sufficient to now claim the exclusion of such a step because nowhere in the disclosure has Applicant discussed the use of fermentation in the context of the claimed composition. The fermentation step is a process of making the algae extract and the process is an intended use in a composition claim and does not have a patentable weight. An intended use fails materially or physically limit the structure of the composition of the prior art can perform such a use, then it meets the claims.

It would have been obvious to one of ordinary skill in the art to use the teachings of the above references to produce a cosmetic base comprising of an aqueous extract of an algae and the algae is not Chlorella. It is claimed in the Specification that the algae used in the cosmetics composition are of the genus Porphyra, wakame seaweeds, Chlorella, or Spirulina. Therefore, it is obvious to one skilled in the art to substitute one genus of the algae with another genus that have the same properties and produce the same end result.

One would have been motivated to create such a composition because Albitskaya et al. teaches the aqueous extraction of an algae, Chlorella, which is within the skilled artisan the genus Chlorella by genus Spirulina that share the same physical properties to produce the desired product. Briand teach using extracts of brown, green, or red algae obtained by aqueous extraction and Zulli et al. teach incorporating aqueous extract of algae of the genus Spirulina in a cosmetic composition. Therefore, one of ordinary skill in the art would have been motivated to use the teachings of Albitskaya et al. with Briand and Zulli et al. to produce the cosmetic base of the composition.

Finally, one would have a reasonable expectation of success given that Albitskaya et al. and Biand provide a detailed blueprint for making and using different algae obtained by aqueous extraction, and the steps of which are routine to one of ordinary skill in the art.

Thus in the absence of evidence to the contrary, the invention of claims 8-24 would have been prima facie obvious as a whole to one of ordinary skill in the art at the time the invention was made.

Applicant's remarks have been fully and carefully considered in their entirety, but fail to be persuasive.

Conclusion

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Zohreh Vakili whose telephone number is 571-272-3099. The examiner can normally be reached on 8:30-5:00 Mon.-Fri.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin Marschel, can be reached on 571-272-0718. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Zohreh Vakili

Patent Examiner
1614

September 27, 2007

Ardin H Marschel 9/30/07
ARDIN H. MARSCHEL
SUPERVISORY PATENT EXAMINER